88-477

No. 88-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOE MONASTERO; SAM KATZMAN; and
MARLENE "MARDY" MCCULLOUGH;

Appellants,

vs.

STATE OF NEBRASKA;

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Since the circulation of initiative petitions necessarily constitutes "core political speech" entitled to the highest protection of the First and Fourteenth Amendments to the United States Constitution:

A. May the State of Nebraska enact a regulatory scheme which restricts the method of circulating initiative petitions in a manner which is unduly restrictive and unnecessary to accomplish its stated purpose of preserving the integrity of the process?

B. May the State of Nebraska enact one penalty clause for the entire act which purports to punish every violation of any of the hypertechnical provisions of the act with a Class IV felony when such a severe penalty is unnecessary to accomplish the State's purpose?

C. May the Nebraska Supreme Court refuse to consider the constitutionality of NEB. REV. STAT. § 32-705, when that section provides the definition and meaning of "falsely swear to a signature" found in NEB. REV. STAT. § 32-713 (with which these Appellants were charged) and when those statutes are so interrelated that they must be read together to have meaning and legal effect?

2. Is the Nebraska Supreme Court's judgment that NEB. REV. STAT. § 32-713 (Reissue, 1984) is constitutional a "final" judgment within the meaning of 28 U.S.C. § 1257(2), even though the case was remanded for further proceedings since: (1) the federal issue has been finally

decided in the State Court; (2) reversal of the State Court on the federal issue would be preclusive of any further litigation on the case; (3) in the further State proceedings pending these Appellants might prevail on the merits, on nonfederal grounds, thus rendering unnecessary the review of the federal issue by this Court; and (4) refusal to immediately review the State Court decision would seriously erode federal policy because citizens of the State of Nebraska would be unable to discuss publicly whether legisation, of societal concern, should be put to the ballot without risking criminal sanctions?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Nebraska Supreme Court is reported at 228 Neb. 818, 424 N.W.2d 837 and is reprinted in the Appendix hereto, App. 1, *infra*.

The opinion of the District Court of Douglas County, Nebraska has not been reported and is reprinted in the Appendix hereto, App. 33, *infra*.

JURISDICTION

The Judgment of the Nebraska Supreme Court, reversing the judgment of the District Court of Douglas County, Nebraska, and finding that NEB. REV. STAT. § 32-713 was constitutionally valid was entered on June 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTES INVOLVED

NEB. REV. STAT. §§ 32-705 and 32-713 are part of an entire article[1] which regulates the constitutionally[2] reserved powers of initiative and referendum. Section 32-705[3] requires that each ballot petition contain a

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[1] NEB. REV. STAT. §§ 32-702 to 32-713.01.

[2] Neb. Const. art. III, §§ 1 and 2.

[3] NEB. REV. STAT. § 32-705, is set out in full in the Appendix hereto App. 49, *infra*.

circulator's affidavit in the prescribed form, whereby the circulator must swear to a variety of facts, including the fact that the signatures were obtained in the county where the circulator is a registered and qualified voter and that each person whose name appears on the petition signed in the presence of the circulator. Section 32-705 also prohibits the circulator from circulating petitions outside the county of his residence and registration as a voter unless he has previously obtained a bond from the Secretary of State. The section prohibits any payment to circulators other than payment for expenses incident to circulation of the petition, such as meals, travel and lodging. A printed warning is required by the section to be placed upon each petition. The warning must indicate that any willful violations of the act will be punishable by a fine, not exceeding $500.00 or by imprisonment in the Department of Correctional Services not exceeding two years, or both such fine and imprisonment.[4]

Section 32-713[5] provides that every circulator or signer must be a registered voter unless he files an affidavit indicating that he is a qualified elector, and it also sets forth a list of technical requirements concerning the method of signing petitions. Section 32-713 makes it a

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[4] The penalty recited in the warning required by § 32-705 is incorrect. The actual penalty clause contained in § 32-713 provides that violations of the article constitute Class IV felonies. A Class IV felony as defined by NEB. REV. STAT. § 28-105 carries a penalty of a maximum five years imprisonment, or a $10,000.00 fine, or both.

[5] NEB. REV. STAT. § 32-713, is set out in full in the Appendix hereto, App. 52, *infra*.

crime to "falsely swear to any signature" upon a petition. Finally, the section contains the penalty clause making any willful violation of any of the provisions of the act a Class IV felony.

STATEMENT OF THE CASE

All of the Appellants were charged in the District Court of Douglas County, Nebraska with the crime of "falsely swearing to a signature upon an initiative petition".[6] Each of the Appellants filed a Motion to Quash the Informations filed against them and asserted that the statutes §§ 32-705 and 32-713 which formed the basis of the charges against them were unconstitutional on certain state constitutional grounds and were also violative of the First and Fourteenth Amendments to the Constitution of the United States.

All of the Motions to Quash were consolidated and assigned to the Honorable Paul J. Hickman, who found that the statutes were so interrelated they had to be read together and that they did indeed violate the rights of the Appellants under the First and Fourteenth Amendments to the Constitution of the United States.

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[6] The information in *State vs. Monastero* is set out in the Appendix hereto, App. 54, *infra*, as a representative example of all the Informations. Each of the other Appellants were charged with identical crimes in virtually identical Informations. There was no assertion by the State that any of the Appellants signed petitions as circulators which contained signatures which were not genuine.

The District Court found that the State did have a compelling interest to prevent fraud, deception and misrepresentation in the initiative process. However, the Court found that §§ 32-705 and 32-713 were overly broad and not narrowly drawn to accomplish the State's purpose. The Court also found that the crime of "falsely swear(ing) to any signature upon such petition" as provided in § 32-713 was unconstitutionally vague.

The State of Nebraska filed an exception to the District Court's ruling and appealed to the Nebraska Supreme Court. The Nebraska Supreme Court sustained the exception, vacated the judgment and remanded the case for further proceedings.

The Nebraska Supreme Court first found that the crime of "falsely swear(ing) to a signature" on an initiative petition as provided in § 32-713 was not vague and constitutionally invalid. This it did by holding that the crime of false swearing contained in § 32-713 is defined by combining the language of § 32-713 with the language of § 32-705 which provides for the circulator's affidavit. The Court thus held that these Appellants had not simply been charged with "falsely swear(ing) to a signature" but rather with falsely swearing that each person whose name appeared upon the petition personally signed the petition in the presence of the circulator; this despite the fact that nothing in the actual charge or the record would permit the Court (let alone the Defendants) to determine the exact nature of either the swearing or its falsity. The Court reasoned that that particular portion of the circulator affidavit required by § 32-705 was not unconstitutional and therefore could form the definition of false swearing when § 32-705 and § 32-713 were read together.

The Court in fact said that by reading § 32-713 and § 32-705 together, the petition circulator had adequate and fair notice of the subject matter of the false swearing.

However, in ruling that § 32-713 was not overly broad, the Court held that there was no reasonable or legal connection between the crime charged and the challenged provisions of § 32-705. The Court held that these Appellants did not have third-party standing to assert that the statute was overbroad and restricted their freedom of speech. The Court held that in order for the Appellants to have third-party standing to challenge the statute as overly broad, their conduct, as speech, must be within the purview of the actual statute claimed to be overbroad. The Court said that there was no nexus between the Defendants' conduct and the provisions of § 32-705, which were found by the District Court to be unconstitutional. The Court concluded that, with regard to these Appellants, there was no existing case or controversy regarding § 32-705 and therefore, it was unnecessary for the Court to consider the unconstitutional provisions of § 32-705 and that § 32-713 standing alone was not vague or overly broad.

The Nebraska Supreme Court did not address the question of whether the penalty clause contained in § 32-713 impermissibly restricted free speech because it was unduly severe by virtue of a penalty which was applicable to even minor infractions of every provision of the entire article.

These Appellants bring this appeal from that decision.

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

A. NEB. REV. STAT. §§ 32-705 AND 32-713 RESTRICT CORE POLITICAL SPEECH AND HAVE A CHILLING EFFECT ON THE RIGHTS OF NEBRASKA CITIZENS TO CIRCULATE AND SIGN INITIATIVE PETITIONS.

Because of the Nebraska Supreme Court's Opinion in this case, §§ 32-705 and 32-713 have been declared constitutionally valid or permitted to escape review. As a result, citizens of the State of Nebraska are unable to use the initiative process to discuss publicly whether legislation, of societal concern, should be put to the ballot without risking criminal sanctions. Both §§ 32-705 and 32-713 are overly broad and should be read together and subjected to facial review because of their substantial effect on First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Grant v. Meyers*, 108 S. Ct. 1886 (1988).

These Appellants have standing to mount facial challenges to §§ 32-705 and 32-713 because those statutes are overly broad and unnecessarily restrict their free speech and the free speech of other citizens of the State of Nebraska. This Court has been willing to grant standing and accept facial challenges to statutes – even those statutes that have a valid governmental purpose – because this Court will not permit such governmental purposes to be achieved by statutory means "which sweep unnecessarily broadly and invade the area of protected freedoms". *NAACP v. Alabama*, 377 U.S. 288 (1964). The rights

protected by the First Amendment "are delicate and vulnerable" and the very "threat of sanctions may deter their expression almost as potently as the actual application of the sanctions". *NAACP v. Button*, 371 U.S. 414, 433 (1963). Unconstitutionally overbroad statutes can chill protected expression by causing "a continuous and pervasive restraint on all freedoms of discussion that might reasonably be regarded as within their purview." *Thornhill v. Alabama*, 310 U.S. 88 at 98 (1940). Only by permitting facial attacks on such statutes can the unfettered exercise of First Amendment freedoms be protected.

Second, facial challenges are necessary because the alternative of awaiting the outcome of individual prosecutions in State Courts does not adequately protect First Amendment freedoms. Aside from the enormously high costs and lengthy delays involved once such prosecutions are commenced, (*See, Dombrowski v. Pfister*, 380 U.S. 479 at 486-487) a person contemplating protected behavior may be deterred from acting by risk of conviction, even though his challenge of the law might eventually be upheld. Consequently, the chill on protected activity has the effect of deterring those whose legal challenges are necessary to narrow an overly broad statute. Absent facial challenges to overbreadth, then, "the contours of [a statute] would have to be hammered out case by case – and tested only by those hardy enough to risk criminal prosecution to determine the [the statutes] proper scope". *Dombrowski v. Pfister*, 380 U.S. at 487. In short, the system simply does not have time to tolerate the lengthy and cumbersome "as applied" process as it slowly winnows the statute to a constitution nub year by year, while the

First Amendment rights of its citizens are being chilled or violated throughout the process.

Facial review is especially important in this case because the circulation of initiative petitions seeking to obtain a constitutional amendment permitting a statewide lottery necessarily constitutes "core political speech", for which First Amendment protection is at its zenith. *Buckley v. Valeo*, 424 U.S. at 39; *Grant v. Meyers*, 108 S. Ct. 1886 (1988).

At first glance, these statutes may appear to be content neutral time, place and manner restrictions. A more thoughtful analysis, however, discloses that the statutes are not truly content neutral. The subject matter which the statutes seek to restrict and regulate will normally be in opposition to the will of the Legislature. Initiatives are undertaken to enact laws which the Legislature has refused to enact and referenda are undertaken to repeal laws which the Legislature has enacted. Therefore, the subject matter of the initiative or referendum petition will always be inherently contrary to the desires of the Legislature. In that sense, the Legislature has a vested interest in curtailing or limiting the initiative or referendum process since ballot measures are in direct competition with its legislative power. The natural antagonism between the Legislature and ballot measures was sought to be avoided by Article III, § 4 of the Nebraska Constitution which makes the constitutional provisions relating to ballot

measures self executing and permits the Legislature only to enact laws which facilitate the process.[7]

However, the most disturbing feature of §§ 32-705 and 32-713 is the fact that they are so hypertechnical and overregulating that they lend themselves to uneven enforcement and permit the State to selectively utilize the statutes as a means of content-based suppression. Because of the number of technical requirements contained in the statutes, it is virtually impossible to undertake a petition drive without some violations. Any violation is a Class IV felony. Consequently, any prosecution carries with it powerful and deterring significance.

The ballot issue in this case was a proposed constitutional amendment to permit a state-wide lottery. It was fiercely resisted by institutionalized racehorse interests

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[7] *Yenter v. Baker*, 284 P.2d 311 (Colo. 1952) wherein the Court said:

> Second, the initiative and referendum constitutional amendment provides that it shall be in all respects self-executing. It is not a mere framework, but contains the necessary detailed provisions for carrying into immediate effect the enjoyment of the rights therein established without legislative action. We said in *Town of Lyons v. City of Longmont*, 54 Colo. 112, 129 P. 198, 200: "A constitutional provision has a higher form of statutory law which the people may provide shall be self executing; the object being to put it beyond the power of the Legislature to render it nugatory by refusing to pass laws to carry it into effect."
>
> An equally important object of self execution is to put it beyond the power of the Legislature to render it nugatory by passing restrictive laws.

and other voices powerful in State Government. In this case, the State did not like the message. On the other hand, the State has a right not to prosecute and may refuse to enforce the statutes with regard to speech which is acceptable to the State.[8]

These statutes do in fact lend themselves to an uneven enforcement on the basis of the views expressed. If the purpose of the act or its enforcement is to distinguish between speech which is pleasing to the government and that which is not, the statute establishes a method of government censorship which should not be tolerated under First Amendment principles.

> There are some purported interests – such as the desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the market place of ideas – that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of case is that the First Amendment forbids the government to regulate speech in a way that favors some viewpoints or ideas at the expense of others.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). The over-technical provisions of these statutes permit them to suffer from a covert form of discrimination that can result when the governmental authority is vested with arbitrary discretion. Since such discretion has

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[8] There have been recent newspaper reports concerning the Attorney General's refusal to prosecute several admitted acts of circulator false swearing in other petition drives. Presumably the subject matter of those drives was acceptable to the State.

the potential for becoming the means of suppressing a particular point of view, statutes which are subject to that kind of arbitrary application are inherently inconsistent with a valid time, place and manner restriction. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-153 (1969); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

Whether analyzed alone or together, §§ 32-705 and 32-713 are overly broad. Most of the litany of technical requirements concerning the method of signing petitions found in § 32-713 had been specifically disapproved by the Nebraska Supreme Court in *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968). In that case, the Nebraska Supreme Court required the Secretary of State to reinstate signatures stricken for technical violations contained in § 32-713. In 1969, the Legislature enacted the present form of § 32-713 restating all of the same technical requirements which were criticized by the Court in *Morris v. Marsh, Id.*

Section 32-713 contains the only penalty clause for the entire act. It makes any willful violation of any of the provisions of the Act a Class IV felony. Under Nebraska law, willfully merely means intentionally or purposely, and not accidentally or involuntarily. It does not require criminal intent or a motive to violate the law. *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580, 584 (1988); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620, 624 (1986). Therefore, in order to be guilty of a Class IV felony under the Nebraska ballot laws, one need only intend to use ditto marks or intend to use her husband's Christian name when she signs the petition. It does not require bad motive. The concept of subjecting minor technical violations with the same penalty suitable for major violations,

such as forging names to an initiative petition, violates the Nebraska Constitution which requires all penalties to be proportionate to the nature of the offense. Neb. Const. art. I, §15. A disproportionate penalty unnecessarily deters participation in the petition process and constitutes a direct and substantial infringement of the right of free speech. Because § 32-713 contains an array of unnecessary technical restrictions and contains an unreasonably harsh penalty clause, it is particularly susceptible to use by the State as a disguised method of restricting core political speech. It is overly broad because its restrictions and blanket penalty are unnecessary for the State to accomplish its legitimate goals.

Section 32-705 also contains a number of constitutionally invalid provisions. As an example, § 32-705 prohibits a circulator from circulating the petition outside the county of his voter registration. The State did not offer to prove and these Appellants cannot perceive of any actual connection between the restriction and the State's interest to be served by it.

The most efficient and productive manner of campaigning for ballot issues requires the circulator to go to the place having the greatest number of potential signers. If the ballot supporters are to be able to get the ballot measure submitted to the voters, they must within a relatively short period of time obtain sufficient petition signatures.[9]

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[9] Art. III § 2 of the Nebraska Constitution requires a petition for the amendment of the constitution to be signed by ten percent of the electors of the State and shall be so distributed as to include five percent of the electors of each of two-

(Continued on following page)

Restricting the circulator to the county of his residence and therefore his voter registration does not in any way serve the State's desire to verify the authenticity of the signatures. To begin with, all of the petitions are separated according to counties. Therefore, at any large gathering, the circulator would approach an individual and request that he sign a petition and would determine the potential signer's home county. He could then have the signer sign a petition relating solely to his home county. After all of the petitions have been submitted to the Secretary of State, those petitions with the same counties would be forwarded to the election commissioner or the county clerk of that county for verification.

The fact that the petition may have been signed in a different county does not in any way interfere with the verification process. The State has not offered to prove that permitting circulators to obtain signatures outside of the circulator's home county in any way contributes to fraud or limits the ability of the Secretary of State's office to count and verify the authenticity of the signatures. The statutory restriction does not serve the interest of the State in preventing fraud or verifying signatures. It is

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(Continued from previous page)

fifths of the counties of the State. If sufficient signatures are obtained, the Secretary of State is required to submit the measure to the electors of the State at the first general election, held not less than four months after the petition shall have been filed. Neb. Const. art. III, § 2.

The whole number of votes cast for governor at the general election next preceding the filing of the initiative petition shall be the basis on which the number of signatures to such petition shall be computed. Neb. Const. art. III, § 4. In this particular case, 54,790 signatures were needed to place the measure on the ballot.

therefore an unconstitutional limitation on the right of free speech.

Although the State has a legitimate interest in protecting against fraud, the method selected by the State in enacting §§ 32-705 and 32-713 was far from the least restrictive means of accommodating those interests with the constitutional rights protected by the First and Fourteenth Amendments.

B. THE APPELLATE JURISDICTION OF THIS COURT IS INVOKED BY 28 U.S.C. § 1257(2) EVEN THOUGH FURTHER PROCEEDINGS HAVE BEEN MANDATED IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA.

In determining whether this Court has jurisdiction in the appeal of this case, pursuant to 28 U.S.C. § 1257(2), two questions occur: (1) whether the constitutional validity of § 32-713 was "drawn into question" with the Nebraska Supreme Court upholding its validity, and (2) whether the decision of the Nebraska Supreme Court is a "final judgment or decree".

The constitutionality of Neb. Rev. Stat. § 32-713 was obviously called into question. The Trial Judge sustained the Appellants' Motions to Quash the Informations against them, based upon his finding that § 32-713 was constitutionally invalid, since it violated the Appellants' First and Fourteenth Amendment rights. The State of Nebraska took exception to that ruling and appealed the District Court's finding of unconstitutionality to the Nebraska Supreme Court. The Nebraska Supreme Court sustained the State's exceptions and held that Neb. Rev. Stat. § 32-713 was neither unconstitutionally vague nor

overly broad and therefore was valid and enforceable. The statute was drawn into question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity. That decision invokes this Court's appellate jurisdiction. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975), *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979).

The second question is whether the decision of the Nebraska Supreme Court is "final" since the case was remanded for further proceedings. This Court has ruled, in *Cox Broadcasting Corp. v. Cohn, supra* at 477 that there are at least four categories of cases in which this Court has treated as "final" with the meaning of 28 U.S.C. § 1257 a decision by the highest Court of the State determining a federal question with further proceedings to follow.

The first category of cases outlined in *Cox* were those cases in which the federal question was decided by the highest State Court under circumstances where the federal question would be conclusive with regard to the ultimate result of the case--where, in other words, the outcome of further proceedings is preordained. The Court described those cases as concluded for all practical purposes and thus held that the judgment of the State Court on the federal issue in such matters would be deemed final.

Mills v. Alabama, 384 U.S. 214 (1966) was cited as an example. In *Mills* the State Court sustained a demurrer to a criminal complaint on federal constitutional grounds. The State Supreme Court reversed and remanded for a trial. This Court took jurisdiction on the basis that the

appellant had no defense, other than his constitutional claim and could not prevail at trial on the facts or on any nonfederal grounds. This Court said:

> Thus if the case goes back to the Trial Court, the trial, so far as this record shows, would be no more than a formal gesture leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mill's constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.

Id. at 217, 218.

This case certainly falls within the first category of cases under the *Cox* analysis. Without doubt, the federal constitutional issue constitutes the primary issue available to the defense. If the trial on remand is permitted to go forward, these Appellants may very well be convicted and would be required to appeal again to the Nebraska Supreme Court where that Court would merely formally repeat its decision with regard to the constitutionality of the state. Under the circumstances of this case, the Nebraska Supreme Court's ruling is ripe for appellate review.

In addition, because of the First Amendment issue involved, this case clearly comes within the fourth category of cases which this Court has viewed under *Cox* as constituting final judgments within § 1257. These are cases:

> Where the federal issue has been finally decided in the State Courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the Sate Court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the State proceedings still to come. In these circumstances, if a refusal immediately to review the State-Court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the State Courts for purposes of State litigation.

Cox Broadcasting Corp. v. Cohn, supra at 482-483.

In the present case, the federal constitutional issue has been decided by the Nebraska Supreme Court. A reversal of the Nebraska court by this Court would preclude any further proceedings. On the other hand, if these Appellants could somehow prevail in the remaining State proceedings, the unreviewed decision of the Nebraska Supreme Court might seriously erode federal policy in the area of core political speech entitled to prompt protection under the First Amendment to the Constitution of the United States.

In *Goodyear Atomic Corp. v. Miller,* 100 L.Ed.2d 158 (1988), this Court considered a ruling by the Ohio Supreme Court as final, even though further proceedings were anticipated before the Ohio Industrial Commission, because the decision had important implications for the regulation of federally owned nuclear production facilities in other states.

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), a candidate for public office sued a newspaper for refusing, contrary to state statute, to publish his reply to the paper's editorial criticizing his qualifications. *Id* at 242. The Florida Supreme Court sustained the statute, remanding the case for trial. This Court held that the state court decision was final for the purposes of 28 U.S.C. § 1257, reasoning that:

> It would be intolerable to leave unanswered an important question of freedom of the press under the First Amendment; and uneasy and unsettled constitutional posture . . . could only harm the operation of free press.

Tornillo at 247, n.6. *See also, Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Because First Amendment rights "are delicate and vulnerable" and the very "threat of sanctions may deter their expression almost as potently as the actual application of the sanctions" (*See NAACP v. Button*, 371 U.S. at 433), the unreviewed decision of the Nebraska Supreme Court would seriously erode federal policy in the area of First Amendment rights.

CONCLUSION

The Appellants respectfully request that probable jurisdiction be noted and that plenary briefing and argument on the merits be ordered.

Dated September, 1988.

Respectfully submitted,

JOE MONASTERO, SAM KATZMAN and MARLENE McCULLOUGH, Appellees,

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APPENDIX

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellant,
v.
Joe Monastero, Appellee.
State of Nebraska, Appellant,
v.
Marlene "Mardy" McCullough, Appellee.
State of Nebraska, Appellant,
v.
Sam Katzman, Appellee.
State of Nebraska, Appellant,
v.
William M. Katzman, Appellee.
State of Nebraska, Appellant,
v.
Bernice Labedz, Appellee.

Case Caption

State v. Monastero

Filed June 17, 1988.
Nos. 87-387, 87-388, 87-389, 87-390, 87-391.

Appeal from the District Court for Douglas County: Paul J. Hickman, Judge. Exceptions sustained, and cause remanded for further proceedings.

Robert M. Spire, Attorney General, William L. Howland, and Ronald L. Staskiewicz, Douglas County Attorney, for appellant.

Thomas J. Guilfoyle of Frost, Meyers, Guilfoyle & Westover, for appellees.

STATE V. MONASTERO

NOS. 87-387, 87-388, 87-389, 87-390, 87-391 – filed June 17, 1988.

1. Constitutional Law. Speech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes.

2. ___. Not all speech is protected by the first amendment. As speech, fraud, misrepresentation, and deceit are unprotected by the first amendment.

3. Due Process: Criminal Law: Statutes. Due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials.

4. ___: ___: ___. The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.

5. Words and Phrases: Initiative and Referendum. *Falsely*, as used in Neb. Rev. Stat. § 32-713 (Reissue 1984), means deliberately or intentionally and refers to an act, "to swear," done with the actor's knowledge. *Falsely*, as used in § 32-713, specifies the element of deliberate or intentional untruth or deceit regarding a circulator's

swearing to a petitioner's signature on an initiative petition, that is, the circulator's false swearing must be an intentional or deliberate act.

6. Constitutional Law: Standing: Statutes. Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the first amendment rights of other parties not before the court.

7. ___: ___: ___. To have third-party standing to assert that a statute is overbroad and prohibits or impermissibly restricts freedom of speech, a defendant's conduct, as "speech," must be within the purview of the statute claimed to be overbroad.

8. ___: ___: ___. For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

SHANAHAN, J.

In separate informations filed in the district court for Douglas County, the State charged the defendants, Joe Monastero, Marlene "Mardy" McCullough, Sam Katzman, William M. Katzman, and Bernice Labedz, with two counts of falsely swearing to a signature upon an initiative petition, in violation of Neb. Rev. Stat. § 32-713 (Reissue 1984). The charges arose from activity relative to

the initiative petition to provide a state lottery. Each defendant filed the identical motion to quash the information, alleging that Neb. Rev. Stat. § 32-705 (Cum. Supp. 1986) and § 32-713, when read jointly, violated both the Nebraska Constitution and the U.S. Constitution. The district court sustained the defendants' motions. Pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), the State has taken exception to the district court's rulings and has appealed to this court.

As the result of Neb. Const. art. III, § 2, the people of Nebraska have reserved the power of the initiative for enactment of laws and constitutional amendments through the initiative petition signed by "electors of the state." Neb. Const. art. III, § 4, directs that the constitutional provisions regarding the initiative "shall be self-executing, but legislation may be enacted to facilitate their operation."

Neb. Const. art. VI, § 1, provides: "Every citizen of the United States, who has attained the age of eighteen years, and has resided within the state and the county and voting precinct for the terms provided by law, shall . . . be an elector." Neb. Const. art. VI, § 2, states: "No person shall be qualified to vote who is non compos mentis, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights."

For an initiative petition, § 32-705 prescribes the contents of the petition circulator's affidavit and the "warning," both required to be written on each page of the petition; specifies qualifications for a petition circulator; and prohibits a "hired and salaried" circulator:

Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and below the signatures an affidavit in substantially the following form:

STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

_____, being first duly sworn,
Name of Circulator
deposes and says that he or she is the circulator of the foregoing petition containing ___ signatures; that he or she is a registered *and* qualified voter of the State of Nebraska and county wherein the signatures were obtained; that each person whose name appears on the petition sheet personally signed the petition in the presence of affiant; . . . that each petitioner when he or she signed this petition was a legal and qualified voter of the state and county and qualified to sign the same, and that affiant stated to each petitioner before he or she affixed his or her signature the legal effect and nature of such petition.

_____
Circulator

_____
Address

Subscribed and sworn to before me, a notary public, this ___ day of ___, 19___, at ___, Nebraska.

_____
Notary Public

Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and above the signatures a statement in substantially the following form:

WARNING: Any person signing any name other than his or her own to any petition, any person

knowingly signing his or her name more than once for the same measure at one election, any person who is not, at the time of signing or circulating the same, a registered voter *and* qualified to sign or circulate the same, any person who falsely swears to any signature upon any such petition, any person who accepts money or other things of value for signing the petition, any circulator who offers money or other things of value in exchange for a signature upon any such petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713 shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, by imprisonment in the Department of Correctional Services adult correctional facility not exceeding two years, or by both such fine and imprisonment. Such statement shall be printed in boldfaced type.

. . . .

Every circulator of a petition shall be of the constitutionally prescribed age or upwards, and a resident and a registered and qualified voter of the State of Nebraska and of the county wherein the petitioners reside, except that any person, otherwise qualified, may circulate one or more petitions outside of the county of his or her residence if he or she shall first have filed with the Secretary of State a bond, approved by the Attorney General, in the sum of five hundred dollars, conditioned that in the procuring of signatures to such petition or petitions he or she will conform to all the requirements of sections 32-702 to 32-713. . . . *Any circulator circulating petitions under sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions. A circulator may be paid for his or her expenses incident to circulation of petitions, such as meals, travel, and lodging.* All signatures secured in a manner contrary to sections 32-702 to 32-713 shall not be counted. Clerical and technical errors in a petition shall be disregarded if

the forms herein prescribed are substantially followed.

(Emphasis supplied.)

Among its provisions, § 32-713 specifies a petitioner's qualifications to sign an initiative petition, and sets out the crime of "false swearing" to a signature on an initiative petition:

> *Every person who is a qualified elector of the State of Nebraska may sign an initiative or a referendum petition of any measure upon which he or she is legally entitled to vote; Provided, that no elector shall be qualified to sign or circulate any initiative or referendum petition unless he or she shall be registered as an elector at the time of signing, or unless he or she shall file with the petition an affidavit setting forth the fact that he or she is a qualified elector.* . . . The *express purposes* of the provisions of this section are to aid and assist the Secretary of State and the county clerk or election commissioner in determining the validity of signatures, the electoral qualifications of the signers, and sufficiency of the petition, and *to prevent fraud, deception, and misrepresentation in the circulation and signing of a petition. Any person* signing any name other than his or her own to any petition, or knowingly signing his or her name more than once for the same measure at one election, or *who is not, at the time of signing or circulating the same, a legal voter and qualified to sign or circulate the same, or any person who shall falsely swear to any signature upon any such petition,* or any person who accepts money or other things of value for signing any petition, or any circulator who offers money or other things of value in exchange for a signature upon any petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713, *shall be guilty of a Class IV felony.*

(Emphasis supplied.)

After ruling that the defendants had standing to raise the constitutional issues alleged in their motions to quash, the district court found that §§ 32-705 and 32-713, when read jointly, are unconstitutional, and made specific findings in declaring parts of the subject statutes unconstitutional.

Construing §§ 32-705 and 32-713 together, the district court found that a petitioner's qualifications to sign an initiative petition, as stated in § 32-713, differed from a circulator's qualifications expressed in § 32-705. Under § 32-713, one is qualified to sign an initiative petition if the petitioner-signer is "registered as an elector" (a registered voter) or signs an affidavit, accompanying the initiative petition, that the petitioner-signer is a qualified elector (voter). Thus, as provided by § 32-713, one is qualified to sign an initiative petition as a registered voter (elector) or a qualified voter (elector). Unlike the alternative qualification contained in § 32-713 for a petition signer, § 32-705 imposes dual requirements for qualification of a petition circulator. Under § 32-705, a circulator must be a "registered *and* qualified voter." That twofold requirement for a circulator's qualification also appears in § 32-705 concerning the contents of a circulator's affidavit and the mandatory paginal "warning," which states that the circulator must be a registered voter and "qualified" to circulate the petition, that is, a "registered and qualified voter." The district court concluded that the "registered voter" requirement of § 32-705, as an additional qualification to be a circulator of an initiative petition, would discourage circulation of an initiative

petition and thereby curtail or discourage a form of political expression protected by the first amendment to the U.S. Constitution.

The district court also found that two parts of the required content for a circulator's affidavit, prescribed by § 32-705, discouraged the initiative process as an expression protected by the first amendment. First, the affidavit required the circulator's averment that the circulator was a "registered and qualified voter" of Nebraska and the county where signatures on the petition were obtained. The additional qualification of voter registration necessary to be a petition circulator, according to the district court, would reduce the number of circulators and would thereby unduly restrict activity for circulation of an initiative petition. Second, the affidavit required the circulator's assertion that each petition signer, at the time of signing, was a legal and qualified voter of Nebraska as well as the county and was otherwise qualified to sign the petition. A circulator would undoubtedly rely on the signer's statements concerning such qualification. However, if a later development showed that the signer was not a legal and qualified voter and otherwise qualified to sign the initiative petition, the circulator would be confronted by the circulator's sworn declaration to the contrary. The only way the circulator could avoid such possible conflict would be an inspection of voter registration records to verify the qualifications of each signer of an initiative petition. The necessity of such precautionary measure by a circulator would unduly burden and discourage the initiative process.

Next, the district court found that the prohibition against a "hired and salaried" petition circulator was

unconstitutional as an infringement of the right to freedom of expression under the first-amendment and as a requirement which did not facilitate operation of the initiative process. See Neb. Const. art. III, § 4.

Finally, the district court found that the crime of "false swearing," as set forth in § 32-713, is "unconstitutionally vague and uncertain" for two reasons. First, the subject matter of the sworn falsity is not defined by § 32-713, and "[t]he average citizen would not know what act of his constitutes the crime." Second, § 32-713 does not "require either intent or knowledge to be a material element" of "false swearing."

In its basic elements, the affidavit of § 32-705 requires five sworn declarations by a petition circulator: (1) the number of signatures for the petition; (2) the circulator's status as a registered and qualified voter; (3) presence at the time each petitioner personally signed the initiative petition; (4) the signer's status as one qualified to sign the petition; and (5) each signer was informed by the circulator concerning the legal effect and nature of the initiative petition. Although the district court struck down the affidavit requirements concerning the circulator's and signer's qualificative status, the court made no finding that the three remaining requirements for a circulator's affidavit were unconstitutional. Thus, the requirement that a circulator swear "that each person whose name appears on the petition sheet personally signed the petition in the presence of [the circulator]" remained intact after the court's specific findings concerning the contents of the circulator's affidavit required by § 32-705.

In examining what "speech" is protected by the first amendment, the U.S. Supreme Court expressed in *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982): "That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad . . . ." See, also, *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) ("communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes . . . are within the protection of the First Amendment"); *Cohen v. California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("constitutional right of free expression"); *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967) ("exchange of ideas"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) ("exposition of ideas"); *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) ("communication of information or opinion").

Therefore, speech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes.

However, not all speech is protected by the first amendment. The U.S. Supreme Court stated, in *Konigsberg v. State Bar*, 366 U.S. 36, 49, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961):

> At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," not

> only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

The *Konigsberg* Court noted at 49-50 n.10:

> That view [freedom of speech is absolute], which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement. conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Consequently, as speech, fraud, misrepresentation, and deceit are unprotected by the first amendment.

Validity of a petitioner's signature is an integral part of the initiative, which establishes a direct and participatory democratic process to enact laws in Nebraska. With the requisite number of valid signatures, the proposed law which is the subject of the initiative petition is submitted to a vote of the people. See Neb. Const. art. III, § 2. Without a sufficient number of valid signatures, the initiative petition fails. Validity of signatures on an initiative petition might be established by a requirement that each petitioner sign the petition before one authorized to administer an oath. The impractical logistics of such requirement becomes apparent. To comply with the requirement of a signer's individual oath, each initiative petition would have to be accompanied by one authorized to administer an oath to the petition-signer, or the circulator and the signer would have to present themselves personally before the oath-giver for the purpose of

the petitioner's signature on the initiative petition. A feasible alternative or substitute to a signer's individual oath is the oath of a circulator as one with personal knowledge that a petitioner has, in fact, signed the initiative petition, thus providing at least prima facie validity for signatures on an initiative petition. Without signature validation, even if only prima facie, the initiative process might be invoked and placed in motion without any semblance of compliance with the constitutional provisions governing the initiative. Essentially, then, fraud in invoking the initiative process is fraud perpetrated on Nebraska's Secretary of State and other public officials, who must determine the validity of the signatures on a petition, and ultimately on the people of Nebraska. To deter such fraud, criminal sanctions are applicable through § 32-713. Cf. *Spence v. Terry*, 215 Neb. 810, 340 N.W.2d 884 (1983) (Neb. Rev. Stat. § 23-2010 (Cum. Supp. 1982), providing for recall of a public official, required a minimum number of signatures on the original recall petition before an election commissioner's verification of signatures is required or a supplementary petition is permissible).

With the foregoing background on freedom of speech and the importance of valid signatures in the initiative process, we address the constitutionality of § 32-713, somewhat the reverse of the sequence utilized by the district court, which considered the alleged "overbreadth" of § 32-705 before reaching any question about "false swearing" as a crime under § 32-713.

The State contends that the defendants have no standing to attack the constitutionality of § 32-713, since

they are charged with fraudulent conduct, "false swearing," prohibited by § 32-713. The State relies upon certain language in *Kay v. United States*, 303 U.S. 1, 6, 58 S. Ct. 468, 82 L. Ed. 607 (1938): "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction." Hence, the State concludes: "The defendants have been charged with a fraudulent type of conduct, and by reason thereof, their claim that [§ 32-713 is] unconstitutional is inappropriate." Brief for Appellant at 6. In substance, the State's premise for the defendants' lack of standing is: A defendant, having undertaken to defraud the government, has no standing to attack the penal statute under which the defendant is later charged with perpetration of that fraud. In this appeal, the State's premise ravages the presumption of innocence as a part of due process and creates a curious constitutional conundrum. We point out that we are examining judicial action taken on the defendants' motions to quash the informations charging them. We have no record reflecting that the defendants have, in fact, undertaken to perpetrate any fraud in violation of § 32-713. Next, if a defendant is charged with violation of a fraud statute, but there is a problem with clarity in the definition of fraud in the charging statute, how can a defendant, denied standing as the result of the very nature of the charge, question the meaning of the statute under which the defendant is charged?

Nevertheless, in an effort to defeat standing by the defendants in the present case, the State relies on *Kay v.*

United States, supra, in which the petitioner was convicted of violating § 8(a) and (e) of the Home Owners' Loan Act of 1933, antifraud provisions contained in the act. Under the antifraud provisions of the act, the government charged Kay with making false statements to the Home Owners' Loan Corporation, which was created by the act. Kay challenged the "whole scheme" of the Home Owners' Loan Act, maintaining that Congress lacked constitutional authority to create the Home Owners' Loan Corporation to which Kay had made the false statements. Dismissing Kay's challenge to the constitutionality of all provisions of the Home Owners' Loan Act except § 8(a) and (e) as antifraud provisions, the Court stated:

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

303 U.S. at 6.

In *Kay,* the Court emphasized that "[a]part from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act . . . is clearly applicable." 303 U.S. at 7. Reviewing the separate antifraud provisions of the Home Owners' Loan Act, the Court considered Kay's due process (vagueness) challenge to § 8(a) and concluded: "The statute [§ 8(a)] defining the crime is sufficiently explicit." 303 U.S. at 7. Concerning Kay's

constitutional attack (vagueness) on § 8(e) of the act, the Court held: "We think that the statute sets up an ascertainable standard and is 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' " (Citing and quoting from *United States v. Hill*, 90 F.2d 573 (1937).) 303 U.S. at 9. Therefore, the Court acknowledged Kay's standing to assert a constitutional challenge (vagueness) to § 8(a) and (e) of the Home Owners' Loan Act, which the Court considered apart from the other provisions of the act.

Also, in maintaining that the defendants lack standing to raise a constitutional challenge to § 32-713, the State relies on *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966). In *Dennis*, the government charged petitioners with criminal conspiracy in fraudulently obtaining the services of the National Labor Relations Board (NLRB) for a union. The government alleged that petitioners filed false affidavits to satisfy § 9(h) of the National Labor Relations Act (NLRA), which stated that labor unions could not obtain NLRB investigation of employee representation unless each officer of the union and its parent organization filed "non-Communist" affidavits with the NLRB. Four of the six petitioners, representing that they had resigned from the Communist Party, filed non-Communist affidavits with the NLRB. As a result of the fraudulent filings, the union obtained the use of NLRB services. When they were convicted of criminal conspiracy, the petitioners argued that their convictions should be overturned in view of the unconstitutionality of § 9(h) of the NLRA, requiring the non-Communist affidavit.

The U.S. Supreme Court, in *Dennis*, refused to consider the petitioners' claim that the affidavit requirement in § 9(h) of the NLRA was unconstitutional, and declared:

> We need not reach this question, for petitioners are in no position to attack the constitutionality of § 9 (h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it - a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction.

384 U.S. at 865.

The *Dennis* Court, relying on some of its prior decisions, declined to consider the constitutionality of § 9(h) of the NLRA, since the petitioners, by use of fraudulent and deceitful means, attempted to "circumvent the law which they now seek to challenge." 384 U.S. at 866. The Court also rejected petitioners' attempt to distinguish the Court's prior decisions and show that petitioners' constitutional challenge went to the claimed core of the conviction, namely, petitioners' Communist Party membership and affiliation, which the petitioners falsely represented. The *Dennis* Court then stated:

> We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. *This is a prosecution directed*

> *at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional.*

(Emphasis supplied.) 384 U.S. at 867.

In *Dennis*, the government charged petitioners under a general criminal conspiracy statute - a conspiracy involving false affidavits as an attempt to circumvent the affidavit requirement of § 9(h) in the NLRA. To avoid conviction, the petitioners attempted a collateral attack on the constitutionality of the NLRA, which they were seeking to circumvent by their conspiracy. However, the government never applied the provisions of the NLRA to the petitioners' conduct, nor did a violation of the affidavit requirement in the NLRA constitute a crime. Hence, the *Dennis* Court, at 384 U.S. at 867, qualified its application of the "fraud and deceit" standing doctrine in recognizing that the prosecution was "not an action to enforce the statute claimed to be unconstitutional."

Consequently, *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938), and *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), are cases representing the Supreme Court's development of a standing doctrine, as part of federal law, which precludes a defendant's constitutional challenge to a particular statute, or statutory scheme, when the defendant has fraudulently circumvented or avoided that particular statute and later, during prosecution for violation of a separate criminal statute prohibiting defendant's conduct, seeks to raise a constitutional question concerning the statute which the defendant had fraudulently circumvented or avoided.

The *Dennis* standing doctrine was reaffirmed in *Bryson v. United States*, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969), in which the Court confronted a substantially similar factual situation to that presented in *Dennis*. Bryson was convicted under 18 U.S.C. § 1001 (1982), a general criminal statute prohibiting fraudulent statements to the government. Bryson's fraudulent statement was his denial of affiliation with the Communist Party. More than 10 years after his conviction, Bryson, in a collateral proceeding, claimed that his conviction should be set aside as the result of various constitutional deficiencies in the National Labor Relations Act. Rejecting Bryson's claim, the Court stated: "We find the principle of *Dennis* no less applicable in the case before us. . . . [N]one of the elements of proof necessary for petitioner's conviction under § 1001 has been shown to depend on the validity of [the NLRA]." 396 U.S. at 68-69. However, the Court continued, in *Bryson*: "*Dennis* can hardly be read as instructing courts to impose an extra punishment on a defendant found to have been dishonest by refusing to consider a constitutional argument that is legally relevant to his defense." 396 U.S. at 73.

In view of *Bryson*, the *Dennis* standing doctrine may be applied to prevent a defendant's challenge to the constitutionality of a statute which is collateral and, therefore, irrelevant to the pending prosecution of the defendant. See, also, *United States v. Knox*, 396 U.S. 77, 90 S. Ct. 363, 24 L. Ed. 2d 275 (1969).

This court adopted and applied the rationale underlying the *Dennis* standing doctrine in *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), in which Douglas, a lawyer charged with violating the Code of

Professional Responsibility, challenged the constitutionality of the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1984). Douglas failed to comply with the reporting or disclosure requirements of that act. One specification of misconduct was based on Douglas' failure to report as required by the act. Douglas argued that the act was unconstitutional and, therefore, his conduct should be evaluated without any reference to the alleged violation of unconstitutional legislation.

In *Douglas*, this court rejected Douglas' constitutional challenge to the disclosure act and, noting at 34, 416 N.W.2d at 535, that "[t]he matter before us is not confined to the question [of] whether respondent has violated the act, but the matter of respondent's conduct," relied on *Dennis v. United States, supra*, for the conclusion that "[t]he issue of the constitutionality or unconstitutionality of the Nebraska Political Accountability and Disclosure Act is irrelevant" to the disciplinary issues placed before the court. 227 Neb. at 35, 416 N.W.2d at 535. The Douglas court concluded that Douglas did not have standing to assert his particular constitutional challenge and emphasized that

> [i]n *Dennis*, the prosecution was for the petitioners' fraud. It was not an action to enforce the statute claimed to be unconstitutional. The same is true with the case at bar. *It is a case directed at the respondent's actions, not a case to enforce the statute claimed to be unconstitutional.*

(Emphasis supplied.) 227 Neb. at 36, 416 N.W.2d at 536.

In the present case, the State ignores the U.S. Supreme Court's admonition in *Bryson*, namely, that

"*Dennis* can hardly be read as instructing courts to impose an extra punishment on a defendant found to have been dishonest by refusing to consider a constitutional argument that is legally relevant to his defense." 396 U.S. at 73. Regarding the present appeals, the State has charged the defendants with falsely swearing to a signature on an initiative petition, a violation of § 32-713. However, defendants assert a direct constitutional challenge to § 32-713 and the crime of "false swearing" described in that statute. Unlike the situation in *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), but similar to *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938), this court is confronted with a direct due process (vagueness) challenge to the constitutionality of § 32-713, the statute which is the basis for the prosecution of the defendants. Thus, in contradistinction to *Dennis*, the State prosecutes to enforce the statute challenged by the defendants as unconstitutional. Consequently, we conclude that application of *Dennis* is limited to situations in which a defendant attempts to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another and collateral statute which is irrelevant to the prosecution. Cf. *Douglas, supra*. Therefore, the defendants in the present case have standing for a "vagueness" challenge to the constitutionality of § 32-713.

The vice of vagueness in a penal statute was denounced in *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), by the U.S. Supreme Court's statement:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal

> offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." [Citation omitted.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." [Citation omitted.]

461 U.S. at 357-58. See, also, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

Thus, due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials. See, *Kolender v. Lawson, supra; State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860 (1984); L. Tribe, American Constitutional Law § 12-31 (2d ed. 1988).

Therefore, we must examine the "false swearing" prohibition of § 32-713 to determine whether that penal statute affords constitutionally required due process.

In substance and according to its legislatively expressed purpose, § 32-713 contains antifraud provisions, that is, statutory prohibition and protection against certain types of fraud, deception, and misrepresentation

in the circulating and signing of an initiative petition. Specifically, § 32-713 prohibits a circulator's falsely swearing that every person whose name appears as an initiative petitioner personally signed that petition in the circulator's presence. Such prohibited conduct by a petition's circulator is defined by combining the language of § 32-713, "falsely swear to any signature upon any [initiative] petition," and the language of § 32-705 concerning the circulator's affidavit, namely, that the circulator must declare by affidavit "that each person whose name appears on the petition sheet personally signed the petition in the presence of [the circulator]." " 'The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.' " *State v. Sailors, supra* at 695, 352 N.W.2d at 862.

By reading §§ 32-713 and 32-705 together, a petition circulator has adequate and fair notice of the subject matter of the falsity regarding a petitioner's signature placed on an initiative petition or the conduct condemned and prohibited at the peril of punishment.

In *State v. Copple, supra,* we encountered a defendant's question concerning the due process sufficiency of Neb. Rev. Stat. § 28-511(1) (Reissue 1985) in defining the crime of "theft," namely: "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Copple contended the statute was vague because the word *unlawfully* is not contained in the body of § 28-511(1). Referring to other definitional statutes or sections in the Nebraska Criminal Code pertaining to

"theft," we held that § 28-511(1) is not vague, and stated at 685, 401 N.W.2d at 152:

> Apparently Copple views the Nebraska Criminal Code as absolutely unrelated statutes which, by design or chance, have been collected in chapter 28 of the Revised Statutes of Nebraska. However, the Nebraska Criminal Code is a systematic statutory statement, defining criminal offenses and prescribing penalties for commission of crimes. All facets of a criminal offense need not be embodied in one statute and that statute alone. Characteristic elements of some, but not all, criminal offenses are specified in a statute within the Nebraska Criminal Code, while another statute within the code may specify a meaning assigned to certain elements of a particular crime, and still other statutes prescribe penalties which may be imposed on conviction of a criminal offense. The result is a statutory synergism, supplying information to the ordinary person about conduct condemned as criminal and punishable in a prescribed form. The statutes contained in the Nebraska Criminal Code no more exist in individual isolation than do the people governed by that code. To an ordinary person, § 28-511(1) supplies fair notice concerning conduct which is condemned as criminal and, therefore, prohibited by the Nebraska Criminal Code.

Similar to *Copple*, "false swearing," prohibited by § 32-713, contains sufficient due process definition concerning the subject matter of the falsity condemned by that statute.

As described in § 32-713, "false swearing" is not unconstitutionally vague as the result of the absence of "knowledge" or "intent" expressed as elements for the crime of "false swearing."

Courts have generally determined that the word *false* or *falsely* means "intentionally untrue" or deceitful,

implying an intention to perpetrate a fraud. See, *Nimmo v. State*, 603 P.2d 386 (Wyo. 1979); *State v. Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978) (*false* implies something more than mere untruth, and imports knowledge and a specific intent to deceive); *Commonwealth v. Kraatz*, 2 Mass. App. 196, 310 N.E.2d 368 (1974) (*false* in a statute prohibiting false statements in an application for a driver's license required guilty knowledge as an essential element of the offense); *Laughlin v. Bon Air Hotel Incorporated*, 85 Ga. App. 43, 46, 68 S.E.2d 186, 189 (1951) ("falsely swearing" is "knowingly affirming"); *United States v. Achtner*, 144 F.2d 49 (2d Cir. 1944) (*falsely*, as used in a criminal statute, means something more than an untruth and includes the intent to defraud); *City of Boston v. Santosuosso*, 307 Mass. 302, 30 N.E.2d 278 (1940) (*falsely* means willfully untrue, showing consciousness of guilt).

In *Nimmo v. State, supra*, Nimmo claimed that Wyoming's "false swearing" statute was constitutionally deficient for due process because the statute did not require intent or knowledge as an element of criminal "false swearing." In determining that the statute provided due process and adequate notice concerning the act prohibited, the Supreme Court of Wyoming concluded that the word *false* supplies the element of criminal intent, and stated:

> This court could merely rely upon the word "false" in upholding the constitutionality of the statute. *Black's Law Dictionary*, pp. 721-722 (Rev. 4th Ed., 1968), demonstrates that when the word is used in varying situations it is given different definitions. However, the word is defined in *Black's Law Dictionary, supra*, in this manner: "In law, this word usually

> means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud. . . ." This definition has been adopted in *Lanier v. State*, Alaska, 448 P.2d 587, 593 (1968); and *Wilensky v. Goodyear Tire & Rubber Co.*, 1st Cir., 67 F.2d 389, 390 (1933). *Commonwealth v. Kraatz*, 2 Mass.App. 196, 310 N.E.2d 368, 372 (1974), not only adopts this definition, but makes the following observation: " . . . The term 'false' has generally been interpreted as connoting intentional untruth. [Citing authorities.] . . . "

603 P.2d at 390.

Thus, we conclude and hold that *falsely*, as used in § 32-713, means deliberately or intentionally and refers to an act, "to swear," done with the actor's knowledge. *Falsely*, as used in § 32-713, specifies the element of deliberate or intentional untruth or deceit regarding a circulator's swearing to a petitioner's signature on an initiative petition, that is, the circulator's false swearing must be an intentional or deliberate act.

Section 32-713, defining the crime of "false swearing" in reference to an initiative petition, is not unconstitutional for vagueness. The district court's finding that § 32-713 is vague and, therefore, unconstitutional is incorrect and must be set aside.

We recall that some speech, such as fraud, deception, and misrepresentation, is unprotected by the first amendment. The defendants have contended, and the district court ruled, that "freedom of speech" protected by the first amendment was effectively prohibited by certain provisions in § 32-705, namely, the enhanced requirement for qualification as a petition circulator, the contents of a circulator's affidavit concerning the circulator's and

signer's qualification with respect to the circulated petition, and the prohibition against a "hired and salaried" circulator of an initiative petition. The defendants have questioned those parts of § 32-705, although the particular crime charged against the defendants, "false swearing" prohibited by § 32-713, does not contain any element consisting of the specific provisions of § 32-705 found constitutionally objectionable by the district court.

> For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. . . .
>
> . . . .
>
> Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution. [Citations omitted.]

In re Estate of West, 226 Neb. 813, 829-30, 415 N.W.2d 769, 780-81 (1987).

" 'The province of a court is to decide real controversies and to determine rights actually controverted, and "[t]he judicial power does not extend to the determination of abstract questions." ' " *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 36, 388 N.W.2d 93, 99 (1986) (citing and quoting from *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57 (8th Cir. 1950)).

We are mindful of the U.S. Supreme Court's recognition of third-party standing in certain cases, as expressed in *Schaumburg v. Citizens for Better Environ.*, 446 U.S. 620, 634, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980):

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. [Citations omitted.] In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

Under § 32-713, "false swearing" pertains only to a circulator's deceitful or false declaration that the circulator was present when a petitioner signed his or her name on the initiative petition. As an antifraud provision, § 32-713 aims at the noncommunicative impact of the defendants' conduct and seeks to regulate or eliminate a particular harm not caused by an expression or exchange of ideas, information, or other speech protected by the first amendment. See L. Tribe, American Constitutional Law § 12-2 (2d ed. 1988). The falsity condemned by § 32-713 and charged against the defendants nowise involves or relates to a person's qualification for circulating or signing an initiative petition under § 32-705. The State has not charged these defendants with prohibited payment to a circulator. Simply stated, there is no reasonable and legal connection between the crime charged against the defendants and the challenged provisions of § 32-705. To have third-party standing to assert that a

statute is overbroad and prohibits or impermissibly restricts freedom of speech, a defendant's conduct, as "speech," must be within the purview of the statute claimed to be overbroad. No such nexus exists between the defendants' conduct charged in the present case and the provisions of § 32-705, which were found to be unconstitutional as a violation of the first amendment. Notwithstanding and irrespective of any questioned constitutionality of the specific parts of § 32-705, considered and determined by the district court, prosecution of the defendants would be unaffected and is maintainable under § 32-713 for "false swearing."

The doctrine of third-party standing in first amendment cases, nevertheless, requires that a court must be "[g]iven a case or controversy," see *Schaumburg, supra* at 634, before third-party standing exists. Deciding whether a statute is unconstitutional, when a party's conduct is not even related to or implicated in the questioned statute, becomes a question about the hypothetical or abstract and might be characterized as a purely advisory opinion without resolution of any real controversy between litigants.

> Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Regan v. Time, Inc., 468 U.S. 641, 653, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984).

This court has adopted a four-part test for severability of provisions found to be unconstitutional in an act:

> (1) Whether, when absent the invalid portions, a workable plan remains. . . . (2) Whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts. . . . (3) Whether the severance would do violence to the intent of the Legislature. . . . [And] (4) Whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion.

State ex rel. Douglas v. Sporhase, 213 Neb. 484, 486, 329 N.W.2d 855, 856-57 (1983).

Assuming existence of the defendants' third-party standing, the provisions of § 32-705 found unconstitutional by the district court are clearly severable from the remaining provisions of that statute. The provisions of § 32-705 concerning the contents of a circulator's affidavit, which were not found unconstitutional, would still afford a plausible affidavit as a part of the procedure for circulating and signing an initiative petition. Even without the parts of § 32-705 found to be unconstitutional by the district court, a crime still has been charged against the defendants under a constitutional penal statute, § 32-713, which prohibits "false swearing."

Because the provisions of § 32-705 were not the basis of the prosecution against the defendants in the present cases for "false swearing," see § 32-713, the defendants have failed to show that they are, or may be, adversely affected by the provisions of § 32-705 and, hence, have

failed to demonstrate that § 32-705 will deprive the defendants of a constitutionally protected right as the result of the pending prosecution. In view of the particular charge against the defendants, "false swearing" prohibited by § 32-713, the district court's ruling concerning § 32-705 was unnecessary for disposition of the defendants' constitutional challenge to § 32-713 as vague. Inasmuch as the defendants did not have third-party standing to challenge the constitutionality of § 32-705, the district court's ruling concerning that statute must be set aside. Also, the defendants lack standing to challenge § 32-705 as an alleged violation of Neb. Const. art. III, § 4, which directs that the constitutional provisions regarding the initiative "shall be self-executing, but legislation may be enacted to facilitate their operation." See, *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

Consequently, we conclude that the district court erred by considering the defendants' constitutional challenges to the various provisions of § 32-705. However, we express no opinion concerning the constitutionality of any provision in § 32-705, inasmuch as the appeals now before us present no case and controversy regarding § 32-705, but see, *State v. Radcliffe, post* p. ___, ___ N.W.2d ___ (1988), which this court has issued today, and *Meyer v. Grant*, 56 U.S.L.W. 4516 (U.S. June 6, 1988) (No. 87-920), both of which contain the constitutional conclusion that a statutory prohibition against the use of paid circulators for an initiative petition abridges the initiative proponent's right of free speech in political expression protected by the 1st and 14th amendments to the U.S. Constitution.

Therefore, we sustain the State's exceptions to the district court's judgment, vacate the findings and judgment of the district court, and remand this matter to the district court for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., and BOSLAUGH, J., concur in the result.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. BERNICE LABEDZ, Defendant.	DOC. 119 NO. 862 ORDER
THE STATE OF NEBRASKA, Plaintiff, vs. WILLIAM M. KATZMAN, Defendant.	DOC. 119 NO. 863 ORDER
THE STATE OF NEBRASKA, Plaintiff, vs. SAM KATZMAN, Defendant.	DOC. 119 NO. 864 ORDER
THE STATE OF NEBRASKA, Plaintiff, vs. JOE MONASTERO, Defendant.	DOC. 119 NO. 865 ORDER

THE STATE OF NEBRASKA, Plaintiff,	)	DOC. 120 NO. 9
vs.	)	ORDER
MARLENE "MARDY" McCULLOUGH, Defendant.	)	

Each of the defendants in the aforecaptioned cases has been charged with the same crime and although each defendant may have some different reason or theories to support their respective Motions to Quash the Information, this Court has addressed in the pages following sufficient of those reasons to make a decision and therefore submits but one Order ruling on all motions.

The Court finds that the State's objection based on relevancy to Exhibits 1 through 4 of defendants Labedz and William Katzman should be and the same hereby is sustained.

Defendant McCullough's plea in abatement should be and the same hereby is overruled.

A review of Sections 32-705 and 32-713 R.R.S. 1943, which are the primary sections under attack by the defendants in each of these cases unequivocally reveals that they deal with the First Amendment rights of the people of the State of Nebraska under the Constitution of the United States.

The State has argued that each of the defendants herein do not have standing to attack the constitutionality of the statute under which they have been

charged with violating by false swearing to a signature upon a petition. Except in first amendment cases the State is correct; however, in such cases the rule appears to be otherwise.

> "Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the Court (citing cases). In these First Amendment contexts, the Courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or association activities may be inhibited by the overly-broad reach of the statute."

Village of Schaumberg v. Citizens for a Better Environment, et al., 444 U.S. 620 (1979). Defendants have standing.

The Court disagrees with the defendants that Section 32-713 prevents some electors from signing an initiative petition.

Under the statute an elector who is registered to vote may sign a petition as well as any other elector if the elector files an affidavit that he is a qualified elector. A qualified elector is defined in Article VI, Section 1 of the Nebraska Constitution. I do not find that the affidavit requirement imposes a hardship on an elector. If an elector does not have such an affidavit available, certainly it's not too much to ask to have the promoters of the initiative to have blank affidavits available so that an elector can complete and sign same. The prevention of fraud in the initiative process, which precious process was the first power the people reserved to themselves, facilitates

the operation of the process under the Constitution, Article III, Section 4.

The Secretary of State, through the county clerks and election commissioners of the 93 counties of this State, must have a method by which they can determine whether or not a party signing an initiative petition is in fact an elector of this State. The legislature chose the voter registration process supplemented by the use of affidavits of electors as the method.

Defendants argue that this method contravenes the Constitution and cites *Colorado Project - Common Cause v. Anderson*, 495 P.2d 220 (1972). However, in that case the legislature had restricted the signing and circulating of initiative petitions to registered voters rather than allowing legal voters (electors) or qualified electors to sign as called for by the Colorado Constitution. As indicated, the Nebraska Unicameral did not so limit Section 32-713.

Defendants have suggested an alternative method to that devised by the Unicameral and that suggestion is verifying signatures with combined voter (registered) and driver license lists similar to that used for jury selection.

First it should be pointed out that one of the qualifications of an elector is that he or she be a citizen of the United States. This factual information is not required under the statutes for obtaining an operator's license and it does not appear on the face of the license. The Department of Motor Vehicles is now required for the purpose of juror selection to provide the jury commissioner of each county each December with a magnetic tape or printed list of all licensed motor vehicle operators 19

years of age or older in the county. Neither the magnetic tape nor the printed list would show the citizenship of the person and it would not contain the person's signature which is important in the verifying process. See Section 25-1628 R.R.S. 1943.

The defendants are correct that in enacting legislation to facilitate the self-executing constitutional power of initiative, the legislature may only pass laws which are reasonable, so as not to unnecessarily obstruct or impede the Constitution. Permissible legislation under our Constitution must be such as frees the self-executing operation from obstruction or hindrance. However, at the same time legislation which facilitates the self-executing operation by preventing fraud, deception and misrepresentation is a necessary adjunct.

Defendants allege that the state, when attempting to justify a statute which limits free speech or limits the initiative process, has the burden to show the existence of a subordinating interest which is compelling and even then the State must demonstrate that the means employed were the most closely drawn to avoid unnecessary abridgement of First Amendment rights.

Needless to say, the compelling State interest as set forth by Section 32-713 is to prevent fraud, deception and misrepresentation in the initiative process; however, the State has wholly failed to carry its burden of showing that there are no less restrictive alternatives to protect the governmental interest. *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1546 (7th Cir. 1986). Affirmed by the U.S. Supreme Court, Jan. 20, 1987, Slip Opinion 86-631.

The Constitution provides that the power of initiative may be invoked by a petition signed by a percentage of electors depending upon the nature of the proposal. The Constitution sets forth the qualifications of an elector in Article VI, Section 1, substantially as a citizen of the United States, 18 years of age or older and a resident of the State and County.

Excluded therefrom by Section 2 of Article VI are persons who are non compos mentis, and persons who have been convicted of treason or a felony unless restored to civil rights.

Sections 32-705 and 32-713 are so intertwined that they must be construed together.

The legislature in Section 32-713 has provided that every person who is a qualified elector of the State may sign an initiative petition upon which he or she is legally entitled to vote; provided that no elector shall be qualified to sign or circulate any initiative petition unless he or she shall be registered as an elector at the time of signing or unless he or she shall file with the petition an affidavit setting forth the fact that he or she is a qualified elector.

I have previously approved this legislative scheme as not hindering or impeding the constitutional mandate that the legislature can only pass laws which facilitate the operation of the constitutional provisions.

However, when we review Section 32-705 we find in the affidavit form that the circulator must swear that he or she is a registered *and* qualified voter of the State, etc. rather than a registered or qualified voter. ("Voter" is interpreted by the Court to mean "elector".)

The obvious effect of the misuse of the word "and" is to disenfranchise all electors who have not registered from circulating initiative petitions. The Court takes judicial notice of the fact that not all electors have registered to vote. Under Section 32-713 an unregistered elector has the right to sign or circulate an initiative petition if he or she files an affidavit as required.

This defect impinges upon the First Amendment right of the people and is therefore unconstitutional.

The affidavit form prescribed by the legislature requires the circulator to further swear "that each petitioner when he or she signed this petition was a legal and qualified voter of the state and county and qualified to sign the same, and ***."

If this provision does not constitute a trap for the circulator, nothing ever would. Even if the petitioner tells the circulator at the time of signing that the petitioner is a legal and qualified voter (elector) of the state and county and qualified to sign the same, the circulator could be swearing falsely if in fact the party turned out not to be an elector or to be non compos mentis or a convicted felon. Again, the only possible reliable source of information would be the voting records and it would not facilitate the operation of the initiative process to require the circulator to check the voter registration of each person who signed the petition. Such provision is over-broad and impedes the process. The circulator should be allowed to rely on what the petitioner tells him.

Section 32-705 further provides that:

"Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have

upon it and above the signatures a statement in substantially the following form:

> WARNING. Any person signing any name other than his or her name more than once for the same measure at one election, any person who is not, at the time of signing or circulating the same, a registered voter and qualified to sign or circulate the same, any person who falsely swears to any signature upon any such petition, any person who accepts money or other things of value for signing the petition, or any circulator who offers money or other things of value in exchange for a signature upon any such petition, or any officer or person willfully violating any provision of section 32-702 to 32-713 shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment in the Department of Correctional Services adult correctional facility not exceeding two years, or by both such fine and imprisonment. Such statement shall be printed in bold faced type."

That part of the warning statement required to be in bold-faced type which provides, "any person who is not at the time of signing or circulating the same, a registered voter and qualified to sign or circulate the same" suffers from the same unconstitutionality as the previously mentioned provision and in fact places an icy chill upon any elector who would wish to exercise his initiative rights and who is not a registered voter.

Although in these cases it is not a problem because the proper penalty provision was used on the initiative petitions, the penalty prescribed in the warning is improper and not the penalty for a Class IV felony.

Section 32-705 provides:

> "Every circulator of a petition shall be of the constitutionally prescribed age or upwards, and a resident,

> and a registered and qualified voter of the State of Nebraska and of the county wherein the petitioners reside, except that any person, otherwise qualified, may circulate a petition outside the county of his residence ***."

Once again, the legislature has unconstitutionally required the circulator to be a registered and qualified voter (elector) before he or she may circulate a petition rather than a registered *or* qualified elector, a qualified elector being one who has filed an affidavit with the petition stating that he or she is an elector and has not been disqualified by being non compos mentis or convicted of treason or a felony which convictions have not been set aside.

Section 32-705 further provides:

> "Any circulator circulating petitions under the provisions of sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions. A circulator may be paid for his expenses incident to circulation of petitions such as meals, travel and lodging."

There appears to be a conflict in this country relating to the constitutionality of paying circulators for the express purpose of circulating petitions. Without expanding this opinion with rhetoric and additional citations, I find the clause unconstitutional as not facilitating the operation of the initiative process. Both sides of the issue are discussed in *Grant v. Meyer*, 741 F.2d 1210 (1984). The dissent by Judge Holloway is more persuasive. As an aside, every major industry pays lobbyists to promote and discuss with the lawmakers legislation desired by the industry. Although there are some controls and restrictions on paid lobbyists, there is no reason why controls or

restrictions could not be placed upon paid circulators and those circulators punished for violations. I am not impressed by the fact that the circulators may be reimbursed for expenses incident to the circulation of petitions. A statute can't be just a little bit unconstitutional or a little bit constitutional. It is either constitutional or unconstitutional.

The crime with which the defendants are charged is stated in 32-713: "***, any person who shall falsely swear to any signature upon any such petition *** shall be guilty of a Class IV felony."

The legislature did not require either intent or knowledge to be a material element, thus shall the Court supply those elements or are our penal statutes to be strictly construed? If an elector affirms rather than swears, will that elector be treated the same? What is the crime? Is it swearing to a signature that the circulator knows to be false? Is it swearing to the genuineness of a signature falsely that is not knowing whether or not the signature is genuine, or is it the false swearing to the fact that the circulator saw the party personally sign his or her signature on the petition? The crime charged does not cover the last proposed question as the material elements would be different.

The average citizen would not know what act of his constitutes the crime. The defendants rightfully attack the provision. It is unconstitutionally vague and uncertain.

The State argues that even if there are unconstitutional provisions within a statute that the court should save same if the unconstitutional provisions can be deleted without destroying the statute. I leave this matter

to another day for as applied to these defendants, the Motions to Quash the Informations should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that each of the defendants' Motions to Quash should be and the same hereby is sustained and the Informations quashed.

DATED this 14th day of April, 1987.

BY THE COURT.

/s/ Paul Hickman
District Judge

IN THE SUPREME COURT OF NEBRASKA

THE STATE OF NEBRASKA, Appellant, vs. JOE MONASTERO, Appellee.	)	Case No. 87-387 NOTICE OF APPEAL
THE STATE OF NEBRASKA, Appellant, vs. SAM KATZMAN, Appellee.	)	Case No. 87-389 NOTICE OF APPEAL
THE STATE OF NEBRASKA, Appellant, vs. WILLIAM M. KATZMAN, Appellee.	)	Case No. 87-390 NOTICE OF APPEAL

Appellees, Joe Monastero, Sam Katzman and William Katzman, appeal to the Supreme Court of the United States from the final judgment of this Court entered June 17, 1988, which refused to hold that NEB. REV. STAT. Sections 32-713 and 32-705 are unconstitutional, and reversed the decision of The Honorable Paul J. Hickman, District Court of Douglas County, Nebraska, which held that those statutes violated the First and Fourteenth Amendments to the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C.A. Section 1257(2). Appellees were charged with violating Section

32-713 of the NEB. REV. STAT. (Reissue 1984) which, when read *in para materia* with the definitional Statute Section 32-705, regulates and restricts the manner in which initiative petitions may be circulated in the State of Nebraska. The Appellees at all times have claimed that the statutes were in violation of the First and Fourteenth Amendments to the Constitution of the United States. The final judgment from which this appeal is taken is in favor of the validity of said statutes.

JOE MONASTERO, SAM KATZMAN
and WILLIAM KATZMAN, Appellees,

By: /s/ Thomas J. Guilfoyle
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(402) 330-8800
Attorney for Appellants
Attorney No. 11628

PROOF OF SERVICE

I, Thomas J. Guilfoyle, Esquire, hereby certify that on the 16th day of August, 1988, I mailed by first-class mail, postage prepaid, copies of the Notice of Appeal to the following:

Ronald Staskiewicz
Douglas County Attorney
428 Hall of Justice
17th & Farnam Streets
Omaha, Nebraska 68183

William Howland
Deputy Attorney General
2115 State Capitol Building
Lincoln, Nebraska 68509

/s/ Thomas J. Guilfoyle
Thomas J. Guilfoyle

Filed with the Clerk of the Nebraska Supreme Court on August 16, 1988.

IN THE SUPREME COURT OF NEBRASKA

THE STATE OF NEBRASKA, Appellant,	) Case No. 87-388)) NOTICE OF APPEAL
vs.	)
MARLENE "MARDY" McCULLOUGH, Appellee.	)

Appellee, Marlene "Mardy" McCullough, appeals to the Supreme Court of the United States from the final judgment of this Court entered June 17, 1988, which refused to hold that NEB. REV. STAT. Sections 32-713 and 32-705 are unconstitutional, and reversed the decision of The Honorable Paul J. Hickman, District Court of Douglas County, Nebraska, which held that those statutes violated the First and Fourteenth Amendments to the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C.A. Section 1257(2). Appellee was charged with violating Section 32-713 of the NEB. REV. STAT. (Reissue 1984) which, when read *in para materia* with the definitional Statute Section 32-705, regulates and restricts the manner in which initiative petitions may be circulated in the State of Nebraska. The Appellee at all times has claimed that the statutes were in violation of the First and Fourteenth Amendments to the Constitution of the United States. The final

judgment from which this appeal is taken is in favor of the validity of said statutes.

MARLENE "MARDY" McCULLOUGH,
Appellee,

By: /s/ Thomas J. Guilfoyle
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Deputy Attorney General
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Lincoln, Nebraska 68509

/s/ Thomas J. Guilfoyle
Thomas J. Guilfoyle

Filed with the Clerk of the Nebraska Supreme Court on August 16, 1988.

32-705. Petition; affidavit; contents; circulator; qualifications; bond, when required; expenses; illegal signatures; effect. Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and below the signatures an affidavit in substantially the following form:

STATE OF NEBRASKA)
) ss.
COUNTY OF ___)

_____, being first duly sworn,
Name of Circulator

deposes and says that he or she is the circulator of the foregoing petition containing ___ signatures; that he or she is a registered and qualified voter of the State of Nebraska and county wherein the signatures were obtained; that each person whose name appears on the petition sheet personally signed the petition in the presence of affiant; that the date to the left of each signature is the correct date on which the signature was affixed to the petition and that the date was personally affixed by the person signing such petition; that affiant believes that each signer has stated his or her name, street, number or voting precinct, and his or her city, village, or post office address correctly; that each petitioner when he or she signed this petition was a legal and qualified voter of the state and county and qualified to sign the same, and that affiant stated to each petitioner before he or she affixed his or her signature the legal effect and nature of such petition.

_____
Circulator

_____
Address

Subscribed and sworn to before me, a notary public, this ___ day of ___, 19___, at ___, Nebraska.

_____

Notary Public

Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and above the signatures a statement in substantially the following form:

WARNING: Any person signing any name other than his or her own to any petition, any person knowingly signing his or her name more than once for the same measure at one election, any person who is not, at the time of signing or circulating the same, a registered voter and qualified to sign or circulate the same, any person who falsely swears to any signature upon any such petition, any person who accepts money or other things of value for signing the petition, any circulator who offers money or other things of value in exchange for a signature upon any such petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713 shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, by imprisonment in the Department of Correctional Services adult correctional facility not exceeding two years, or by both such fine and imprisonment. Such statement shall be printed in boldface type.

If the circulator has given the bond provided for in this section, the words and county wherein the signatures were obtained may be omitted from the statement of the circulator's voting qualification in the foregoing form of affidavit.

Every circulator of a petition shall be of the constitutionally prescribed age or upwards, and a resident and a registered and qualified voter of the State of Nebraska and of the county wherein the petitioners reside, except that any person, otherwise qualified, may circulate one or more petitions outside of the county of his or her residence if he or she shall first have filed with the Secretary of State a bond, approved by the Attorney General, in the sum of five hundred dollars, conditioned that in the procuring of signatures to such petition or petitions he or she will conform to all the requirements of sections 32-702 to 32-713. Such bond shall set forth the complete name and address of the bonded circulator. No petition or petitions other than those whose titles appear in the bond application shall be circulated by such bonded circulator. Any circulator circulating petitions under sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions. A circulator may be paid for his or her expenses incident to circulation of petitions, such as meals, travel, and lodging. All signatures secured in a manner contrary to sections 32-702 to 32-713 shall not be counted. Clerical and technical errors in a petition shall be disregarded if the forms herein prescribed are substantially followed.

32-713. Petitions; signers; signature, how made; qualifications; violations; penalty. Every person who is a qualified elector of the State of Nebraska may sign an initiative or a referendum petition of any measure upon which he or she is legally entitled to vote; *Provided,* that no elector shall be qualified to sign or circulate any initiative or referendum petition unless he or she shall be registered as an elector at the time of signing, or unless he or she shall file with the petition an affidavit setting forth the fact that he or she is a qualified elector. Each signer shall at the time of signing, personally affix the date, his or her surname, and Christian or given name in full, except that the middle name or initial may be omitted, and if the Christian or given name is an initial only, the signer shall so state below the name at the time of signing. In addition to the date and his or her signature and printed name, except that no printed name shall be required if his or her signature is legible, the signer shall personally affix the street and street number, or if no street or number exists then a designation of a rural route, or the voting precinct and city or village or post office address. No signer shall use ditto marks as a means of personally affixing the date or address to any petition. A wife shall not use her husband's Christian or given name when she signs a petition, but rather, she shall personally affix her Christian or given name along with her surname. The petition shall conform with the requirements of section 32-4,156. The express purposes of the provisions of this section are to aid and assist the Secretary of State and the county clerk or election commissioner in determining the validity of signatures, the electoral qualifications of the signers, and sufficiency of

the petition, and to prevent fraud, deception, and misrepresentation in the circulation and signing of a petition. Any person signing any name other than his or her own to any petition, or knowingly signing his or her name more than once for the same measure at one election, or who is not, at the time of signing or circulating the same, a legal voter and qualified to sign or circulate the same, or any person who shall falsely swear to any signature upon any such petition, or any person who accepts money or other things of value for signing any petition, or any circulator who offers money or other things of value in exchange for a signature upon any petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713, shall be guilty of a Class IV felony.

Ap Docket 119 No. 865

DISTRICT COURT
DOUGLAS COUNTY

THE STATE OF NEBRASKA
VS.
JOE MONASTERO

DIRECT
INFORMATION

CHARGE
FALSE SWEARING –
TWO COUNTS

WITNESSES

Kelly Quick
16010 Oak Plaza

Duane Ritter, NSP

Rebecca Jane Janssen
7413 Kerry Driver
LaVista, Nebraska

Carolyne Dearborn Dunn
2532 Lillian Street

Harold Moon

M. S. Gallardo, NSP

Allen Beermann
Secretary of State

Dean Heiden, NSP

FILED: September 25, 1986

RUDY J. TESAR, Clerk,
By: /s/ Robert J. Swatek
Deputy

Recorded: Journal 2275 Page 35

DONALD, L. KNOWLES, County Attorney

DLK:pah 12276
ASSIGNED TO JUDGE Carlson

INFORMATION

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

OF THE JANUARY TERM of the District Court of the Fourth Judicial District of the State of Nebraska, within

and for the County of Douglas and the State of Nebraska, in the year of our Lord one thousand nine hundred eighty six, I, DONALD L. KNOWLES, County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and in behalf of the said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed,

that on or about the 29th day of June, 1986,

JOE MONASTERO

late of the County of Douglas and State of Nebraska, then and there being,

did then and there falsely swear to a signature upon an initiative or referendum petition,

COUNT II

AND I, the said DONALD L. KNOWLES, County Attorney of Douglas County, Nebraska, who prosecutes for and in behalf of said state in the District Court of Douglas County, Nebraska, and duly empowered by law to inform of offenses committed in said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and further give the court to understand and be informed,

that on or about the 29th day of June, 1986

JOE MONASTERO

late of the County of Douglas, and State of Nebraska aforesaid, then and there being,

did then and there falsely swear to a signature upon an initiative or referendum petition,

contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska,

/s/ Donald L. Knowles
County Attorney

Class IV Felony 23485 32-713
Class IV Felony 23485 32-713

STATE OF NEBRASKA)
) SS.
COUNTY OF DOUGLAS)

I, DONALD L. KNOWLES, being first duly Sworn, on oath depose and say that I know the contents of the foregoing information; that I have read the same, and the facts set forth in said information are true to the best of my knowledge and belief.

/s/ Donald L. Knowles

Subscribed in my presence and sworn to before me this 25th day of September, 1986.

RUDY J. TESAR
Clerk of the District Court

By /s/ Robert J. Swatek
Deputy

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, RUDY J. TESAR, Clerk of the District Court, Fourth Judicial District of the State of Nebraska, in and for Douglas County, do hereby certify that the foregoing is a full and true copy of the information in the case of The State of Nebraska vs. _____

_____

as appears from the original thereof, now on file and of record in the office of the Clerk of said Court.

WITNESS my signature and official seal, this day of September A.D., 19___.

RUDY J. TESAR
Clerk

By _____
Deputy

_____

No. 88-477

Supreme Court, U.S.
FILED
OCT 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JOE MONASTERO; SAM KATZMAN; and MARLENE "MARDY" McCULLOUGH,

Appellants,

vs.

STATE OF NEBRASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

MOTION OF APPELLEE TO DISMISS

ROBERT M. SPIRE, #13977
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State of Nebraska

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Douglas County Attorney

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12 pp

QUESTION PRESENTED

The question presented by this motion to dismiss is whether the decision of the Nebraska Supreme Court is a "final judgment or decree" pursuant to 28 U.S.C. § 1257(2) where

(1) The Appellants await potential conviction and sentencing for the alleged crimes as charged;

(2) The case was remanded back to the district court for further proceedings (trial).

PARTIES TO PROCEEDINGS BELOW

Parties before the Nebraska Supreme Court: (1) State of Nebraska, the Appellee herein; (2) Joe Monastero, Sam Katzman, and Marlene "Mardy" McCullough, the Appellants herein. In the courts below the Appellee, the State of Nebraska, has been represented by Robert M. Spire, Attorney General, William L. Howland, Assistant Attorney General, and Ronald L. Staskiewicz, Douglas County Attorney. The Appellants, Joe Monastero, Sam Katzman, and Marlene "Mardy" McCullough, were represented by Thomas J. Guilfoyle, of FROST, MYERS, GUILFOYLE & GOVIER in the appeal to the Nebraska Supreme Court.

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No. 88-477

In The
Supreme Court of the United States
October Term, 1988

JOE MONASTERO; SAM KATZMAN; and
MARLENE "MARDY" McCULLOUGH,

Appellants,

vs.

STATE OF NEBRASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

MOTION OF APPELLEE TO DISMISS

Pursuant to Rule 16.1, the Appellee, State of Nebraska, moves to dismiss the appeal filed herein or, in the alternative, to affirm the judgment of the Nebraska Supreme Court on the ground that the state litigation which forms the basis of this appeal is not a "final judgment or decree" from the highest court in the State of Ne-

braska. The Appellants, therefore, have no standing to invoke this Court's appellate jurisdiction under 28 U.S.C. § 1257(2).

STATE STATUTES INVOLVED

Neb.Rev.Stat. §§ 32-705 and 32-713 require that each ballot petition contain a circulator's affidavit in the prescribed form, whereby the circulator must swear that each person whose name appears on the petition signed in the presence of the circulator. Section 32-713 makes it a crime to "falsely swear to any signature" upon a petition and contains the penalty clause making any willful violation of any of the provisions of the act a Class IV felony.

STATEMENT OF FACTS

The Appellants were charged in the District Court of Douglas County, Nebraska, with the crime of "falsely swearing to any signature upon an initiative petition." The Appellants filed a Motion to Quash the Informations filed against them asserting that the charges were unconstitutional and violative of the First and Fourteenth Amendments to the Constitution of the United States. The Motions to Quash were consolidated. The trial court found that the crime of falsely swear(ing) to any signature upon such petition" was unconstitutionally vague.

On appeal the Nebraska Supreme Court reversed finding that the crime of falsely swearing on an initiative peti-

tion was not vague or constitutionally invalid. The Court held that a petition circulator had adequate and fair notice of the subject matter of the false swearing. The Court held that Appellants did not have standing to assert that the statute was overbroad and restricted their freedom of speech.

The Appellants brought this appeal.

ARGUMENT

I.

THIS CASE DOES NOT INVOLVE A FINAL JUDGMENT OR DECREE RENDERED BY THE HIGHEST COURT OF THE STATE OF NEBRASKA, THEREFORE THE APPELLANTS LACK STANDING TO INVOKE APPELLATE JURISDICTION PURSUANT TO SECTION 1257(2)

"Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a 'final judgment or decree'." *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 476-477 (1975). The final judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the state." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1985). In the context of a criminal prosecution, final judgment means

sentence. The sentence is the judgment. *Berman v. United States,* 302 U.S. 211, 212 (1937); *Parr v. United States,* 351 U.S. 513, 518 (1956); *Flynt v. State of Ohio,* 451 U.S. 619, 620 (1981). The present case involves criminal prosecutions in which the Appellants were charged with the crime of "falsely swearing to a signature upon an initiative petition." The Appellants are awaiting trial in the State of Nebraska. They have not been convicted or sentenced.

This appeal arises from the Nebraska Supreme Court opinion (*State v. Monastero,* 228 Neb. 818, 424 N.W.2d 837 (1988)) in which the Nebraska Supreme Court vacated the findings and judgments of the Douglas County District Court and remanded this matter to the District Court for further proceedings.

Judgment of an appellate court reversing the judgment of the lower court and remanding the cause for further proceedings, is not a final judgment, and is not appealable. *Ex Parte French,* 91 U.S. 423, 425-426 (1875); *Smith v. Adams,* 130 U.S. 167, 177 (1889); *Great Western Telegraph Company v. Burnham,* 162 U.S. 339, 341-343 (1896). Moreover, even if the appellate court considers itself bound on the second appeal by its decision on the first appeal, making the second appeal a mere formality, the second appeal is a prerequisite to Supreme Court review. *McComb v. The County Commissioners of Knox County, Ohio,* 91 U.S. 1 (1875). It is clear that there have been no final judgments.

The Appellants contend that this appeal is a final judgment pursuant to *Cox Broadcasting Corporation v. Cohn, supra.* We find that their arguments are not frivolous, but unsound. The Appellants contend that this appeal fits into the first category as mentioned in *Cox.*

> In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive *or* the outcome of further proceedings preordained. (emphasis supplied).

Id. at 479.

The outcome of further proceedings in the state district court is not preordained. There has been no conviction or sentence. This case is not even close to being concluded at the state level.

The Appellants concede that the second and third categories as set out in *Cox* do not apply in the present case. However, the Appellants contend that this appeal fits within the fourth category of cases mentioned in *Cox, supra.*

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the parties seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-483.

It seems apparent that if this Court reversed the judgments of the Nebraska Supreme Court on the federal issue regarding the First Amendment of the United States Constitution, there would be no further proceedings in the state court in these cases. "But the question remains whether delaying review until petitioners are convicted,

if they are, would seriously erode federal policy within the meaning of our prior cases." *Flynt v. State of Ohio,* 451 U.S. at 622. We are confident that this would not be the case because initiative petition drives have succeeded since the failure of the lottery petition drive. This Court does not have a final judgment before it.

Any contrary conclusion would allow the fourth exception to 28 U.S.C. § 1257 to swallow the "final judgment or decree" rule.

Moreover, this Court in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973), stated the policies behind the final judgment rule as follows:

> The finality requirement of 28 U.S.C. § 1257 [28 U.S.C. § 1257] which limits our review of the state courts judgments, serves several ends: (1) It avoids piecemeal review by federal courts of state court decisions; (2) It avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) It limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Id. at 159.

The requirement of finality is not met merely because the major issues in a case have been decided and only a few loose ends remained to be tied up, *Republic Natural Gas Company v. State of Oklahoma,* 334 U.S. 62, 68 (1948).

———o———

CONCLUSION

For the foregoing reasons, the appeal docketed by the Appellants should be dismissed. The appeal before this Court is not a final judgment or decree within the meaning of 28 U.S.C. § 1257(2). The Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Nebraska Supreme Court.

Respectfully submitted,

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No. 88-477

In The

Supreme Court of the United States

October Term, 1988

JOE MONASTERO; SAM KATZMAN; and MARLENE "MARDY" McCULLOUGH,

Appellants,

vs.

STATE OF NEBRASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS

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The State of Nebraska has filed a Motion to Dismiss the appeal in this case arguing that the case does not involve a final judgment pursuant to 28 U.S.C. § 1257(2). Appellants in their jurisdictional statement argue that the decision of the Nebraska Supreme Court upholding the validity of Neb. Rev. Stat. § 32-713 in the face of a constitutional challenge was a final judgment within the meaning of 28 U.S.C. § 1257(2). Appellants believe this to be a final judgment because the constitutional issue was the primary, if not the sole defense available to these Appellants and for the more compelling reason that the most important constitutional right available to American citizens, the right to core political speech, would go unprotected during any further proceedings, which would undoubtedly consume a substantial period of time and exhaust the emotional and financial resources of the Appellants.

The State argues that a judgment cannot be final when anything further remains to be determined. In *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 124 (1945), this court held that the finality rule had not been administered in such a mechanical fashion, and observed that in some instances immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and delayed justice," Id. at 124.

In cases involving first amendment rights, especially when core political speech is involved, the reasons asserted for mechanical adherence to the finality rule pale in comparison with the danger of denying justice by delay. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 n.7 citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148. In *Gillespie*, this court held that the requirement of finality is

to be given a "practical rather than technical construction" and suggested a balancing test of the most important competing considerations, which are "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-153.

These Appellants have asserted that they come within both the first and the fourth category of cases set out in *Cox*, in which this Court has treated the decision on the Federal issue as final for the purposes of 28 U.S.C. § 1257 in spite of the fact that there remained further proceedings in the State Court. The first such category of cases include those in which the Federal issue would not be mooted or otherwise affected by the further proceedings because those proceedings would have little substance and their outcome would be certain. *Mills v. Alabama*, 384 U.S. 214 (1966). The State argues that these Appellants do not fit within this category of cases established by the *Cox* analysis because the outcome of the State District Court proceedings is not preordained since there has not been a conviction or a sentence. These Appellants hold out virtually no hope that they can avoid ultimate conviction, now that their constitutional issue has been decided against them. To require these Appellants to go through the process of a trial, conviction, sentencing, appeal to the Nebraska Supreme Court and then ultimately an appeal to this Court would result in an inexcusable delay and a completely unnecessary waste of time and energy in a judicial system already burdened by delay. It would exhaust the emotional and financial resources of these Appellants and may very well result in their economic inability to bring this issue before this

Court at a later time. As a practical matter, a refusal to hear the appeal at this time may doom these Appellants to accept the Nebraska Supreme Court decision on their constitutional rights as final even though that decision may be in error.

It is interesting to note, as this Court did in *Cox*, that in the concurring opinion in *Mills v. Alabama*, Mr. Justice Douglas joined by Mr. Justice Brennan "stated that even if the Appellant had a defense and might prevail at trial, jurisdiction was properly noted in order to foreclose unwarranted restrictions on the press should the State Court's constitutional judgment prove to be in error." *Cox* supra at 485 n.12.

The State concedes that this case comes within all of the elements of the fourth category of cases set forth in *Cox* with the exception of the final element: that the unreviewed decision of the Nebraska Supreme Court might seriously erode Federal policy. On this point the State is clearly wrong. As its only argument, the State concludes that free speech has not been restricted by the statutes in question because other initiative drives have succeeded.

But the success or failure of petition drives which may have been mounted by the few individuals whose bravery overcame the manifest threat of the sanctions of the Nebraska statutory scheme does not diminish the chill which that scheme casts over the process of core political speech. As Justice Brennan said in *Federal Election Commission v. Massachusetts Citizen for Life, Inc.*, 479 U.S. 238 (1986):

> Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom" *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

There can be no more basic, no more seminal, no more crucial Federal policy than the protection, at the earliest possible stage of the right of its citizens to express their views on the laws which govern them. And there can be no more compelling cry for the enforcement of that policy than the appeal of one whose voice has been stilled by the mechanical application of laws which not only practically operate, but were designed at their conception, to quiet the sound of dissent. A delay in review under the First Amendment in this case is simply the death knell of free, unrestricted expression of political ideas through petition in this State; a process which this court has described as entitled to First Amendment protection at its zenith. *Meyers v. Grant*, ___ U.S. ___, ___, 108 S.Ct. 1886 (1988).

Therefore, these Appellants respectfully request that this Court note probable jurisdiction.

Respectfully submitted,

JOE MONASTERO, SAM KATZMAN AND MARLENE MCCULLOUGH,
Appellants

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